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Decision 05-05-049 May 26, 2005

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Raw Bandwidth Communications, Inc., Complainant, vs. SBC California, Inc. (U 1001 C) and SBC Advanced Solutions, Inc., (U 6346), Defendants.	Case 03-05-023 (Filed May 15, 2003)

ORDER MODIFYING DECISION (D.) 05-01-034 AND D.04-05-006; DENYING REHEARING OF DECISION, AS MODIFIED; AND STAYING D.04-05-006 AND D.05-01-034 TO THE EXTENT THAT THEY DISMISS COUNT 6, CAUSE OF ACTION 3, OF RAW BANDWIDTH'S FIRST AMENDED COMPLAINT

SBC of California, Inc. ("SBC CA") and SBC Advanced Solutions, Inc. ("SBC ASI") (collectively, "SBC") have applied for rehearing of certain aspects of D.05-01-034. We reviewed each and every allegation set forth in the application for rehearing. Although we find that certain specifications of error assigned by SBC have merit, these errors are not material to the decision. Accordingly, we deny SBC's application for rehearing, but order modification of Decision (D.) 05-01-034 and its underlying decision, D.04-05-006, to address those non-material errors and otherwise clarify those decisions.

Moreover, in reviewing the underlying decisions in connection with SBC's rehearing application, in conjunction with a pending petition for writ of review of other aspects of the same underlying decisions (No. A106210, *Raw Bandwidth Communications, Inc. v. Public Utilities Commission of the State of California*,

California Court of Appeal, First Appellate District, Division Four), filed by Raw Bandwidth, we have determined that we will stay D.04-05-006 to the extent that it dismisses Cause of Action 3, Count 6 of Raw Bandwidth's First Amended Complaint ("Advance Notice Claim"), asserting that SBC fails to give Raw Bandwidth reasonable advance notice that SBC is disconnecting a customer's DSL service for failure to pay for the underlying voice service. We also will stay D.05-01-034, our decision denying Raw Bandwidth's application for rehearing of D.04-05-006 with respect to Cause of Action 3, Count 6 of Raw Bandwidth's First Amended Complaint to the same extent. We further direct the assigned Administrative Law Judge ("ALJ") to set a prehearing conference for the purpose of determining further procedures to be pursued in reconsidering the disposition of Raw Bandwidth's Advance Notice Claim.

DISPOSITION OF SBC'S APPLICATION FOR REHEARING

I. FACTS

On May 15, 2003 Raw Bandwidth Communications, Inc. ("Raw Bandwidth"), filed a complaint against Defendants, SBC of California, Inc. ("SBC CA") and SBC Advanced Solutions, Inc. ("SBC ASI").[1] Raw Bandwidth is an Internet Service Provider ("ISP"), which is unaffiliated with SBC. SBC CA is an incumbent local exchange carrier ("ILEC"), which provides voice service. SBC ASI is an affiliate of SBC CA, and provides DSL transport. Also involved, though not a named defendant, is SBC Internet Services ("SBCIS"), an affiliate of SBC CA and SBC ASI, which is an ISP.

Although the complaint raises several issues, only one is at issue here: How SBC CA's 611 interactive voice response system treats calls regarding questions about or repair of customers' Digital Subscriber Line ("DSL") service. Specifically when the customer of an ISP that is affiliated with SBC CA dials 611 seeking information or repair of his DSL service, the customer is connected through to the affiliate ISP's service

[1] For convenience, except as otherwise specified, this memo will refer to Defendants, collectively, as "SBC."

department. When the customer of a non-affiliated ISP, such as Raw Bandwidth, dials 611, however, SBC CA's voice response system advises the customer to hang up and telephone the customer's ISP directly.[2] In its complaint, Raw Bandwidth claimed that this differential treatment was unlawful, and wanted SBC California to do substantially the same thing for Raw Bandwidth's subscriber, *i.e.,* to offer to automatically connect those subscribers to Raw Bandwidth's service department whenever they call dial 611 with a DSL question or difficulty, or to cease providing such a direct connection to its customers of its own affiliate.

On June 30, 2003, SBC filed a motion to dismiss the complaint. Raw Bandwidth opposed the motion. On May 6, 2004, the Commission issued D.04-05-006, denying Raw Bandwidth's complaint. As relevant here, the Commission concluded that SBC CA's differential treatment of customers calling 611 for repair or questions regarding their DSL service did not violate any applicable state or federal law, including Public Utilities Code section 453,[3] the FCC's Computer III Order,[4] and the FCC's N11 Order.[5] The Commission further concluded that SBC CA's differential treatment of customers did not raise competitive concerns.

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[2] As described in D.04-05-006, p. 9:

> "If a caller dials 611 from an SBC California telephone line, the caller receives various Interactive Voice Response System (IVR) prompts, including entering the caller's telephone number. If the telephone number is for a line that has DSL Transport Service, the next prompt states: 'Our records indicate that your voice line includes DSL service. If you are reporting trouble on the data portion of your line, press 1 . . . .' If the caller presses 1, the next prompt states, 'If you are calling about your DSL: Internet access service from SBC Internet Services, press 1 now. Otherwise, if you are calling about DSL Internet access service from another Internet service provider, please hang up and call your Internet service provider.' If the caller presses 1, IVR will connect the caller to SBCIS' IVR."

[3] Section references are to the Public Utilities Code, unless otherwise specified.

[4] Report and Order, *Amendment of Section 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry)* (1986) 104 F.C.C.2d 958.

[5] First Report and Order, *In the Matter of the Use of N11 Codes and Other Abbreviated Dialing Arrangements* (1997) 12 F.C.C.R. 5572.

Raw Bandwidth filed an application for rehearing of D.04-05-006 on June 9, 2004, asserting multiple grounds of error concerning the Commission's denial of its complaint with respect to 611 service. SBC filed a response on June 24, 2004. On January 13, 2005, the Commission issued D.05-01-034 (the "Rehearing Decision"), granting limited rehearing to modify D.04-05-006 on the 611 issue, and requiring SBC CA to cease its discriminatory behavior.[6] The bases for that decision, as relevant here, were Commission conclusions that SBC's differential treatment of 611 calls:

- Constitutes unreasonable discrimination under Public Utilities Code section 453;
- Violates the Commission's Universal Service Rules (*see In Re Universal Service and Compliance with the Mandates of AB 3643* [D.96-10-066] (1966) 68 Cal.P.U.C.2d 524,1996 Cal. PUC LEXIS 1046, in that repair service is a "basic" service under those Rules;
- Confers an undue competitive advantage to SBC's affiliates; and
- Is inconsistent with the FCC's so-called "N11 Order," First Report and Order, *The Use of N11 Codes and Other Abbreviated Dialing Arrangements*(1997) 12 F.C.C.R. 5572 ("the *FCC's N11 Order*").

On February 14, 2005, SBC CA and SBC ASI filed the instant Joint Application for Rehearing. Raw Bandwidth filed a response on March 1. SBC's rehearing application contains numerous assignments of error, challenging each of the Commission's conclusions listed above. We conclude that although some of SBC's assertions appear to have merit, they do not, individually or collectively, demonstrate legal error requiring the grant of rehearing of the challenged decision.

[6] The Commission denied the remainder of Raw Bandwidth's application for rehearing (concerning other claims asserted in Raw Bandwidth's complaint), and Raw Bandwidth subsequently filed a petition for review of that denial in the California Court of Appeal. That petition, which does not pertain to the 611 issue here, currently is being held in abeyance by the court pending disposition of the instant rehearing application. (*Raw Bandwidth v. Public Utilities Commission of the State of California*, Case No. A109210 (California Court of Appeal, First Appellate District).

II. DISCUSSION

A. SBC's Differential Treatment of 611 Callers Constitutes Unreasonable Discrimination in Violation of Section 453

In D.05-01-034 (the "Rehearing Decision") we concluded that SBC's favorable treatment of 611 calls regarding DSL service that come from its own affiliate's customers violates section 453 of the Public Utilities Code. SBC challenges this conclusion on two bases: (1) The Commission's determination lacks an adequate analysis of the facts and law, and is unsupported by sufficient separately stated findings of fact; and (2) the Commission lacks jurisdiction to order that SBC cease such discrimination. Neither of these contentions has merit.

1. The Commission's analysis of the facts and law is adequate

Section 453 prohibits public utilities from making or granting any preference or advantage or from establishing or maintaining any unreasonable difference "as to rates, changes, service, facilities or in any other respect." (Pub. Util. Code § 453(a); see generally, *California Portland Cement Co. v. Southern Pacific Co*. [D.32280] (1939) 42 Cal.P.U.C.2d 92, 117.) The preference may be considered undue only if it provides an advantage to some customers and a disadvantage to others. (*Id.* at p. 117.) To establish any such effect, comparison must be made between comparable situations. (*Reuben H. Donnelley Corp. v. Pacific Bell* [D.91-01-016] (1991) 39 Cal.P.U.C.2d 209, 242.) The discussion and findings in the challenged decision are sufficient to establish a violation of section 453 under these standards. The Commission found, specifically:

- SBC California transfers over 10,000 calls per month from its 611 IVR to its affiliated ISP, SBCIS.
- SBC California does not transfer calls from its 611 IVR to unaffiliated ISPs.
- If an SBCIS subscriber with a DSL repair problem dials 611 from an SBC California telephone line, the caller receives an IVR prompt that will permit

> the customer to be connected to SBCIS without having to hang up and dial a new number. A non-SBCIS subscriber with a DSL problem who dials 611 from an SBC California telephone line receives an IVR prompt to hang up and call the subscriber's ISP.

(D.04-05-006, p.19 [Finding of Fact Nos. 3-5].) These findings clearly establish the fact of discrimination, which, indeed, is undisputed. They also establish the fact that discrimination operates to confer an advantage to some customers and a disadvantage to others. As the Rehearing Decision notes, "it is enough that customers of unaffiliated ISPs must take that extra step [of hanging up and dialing their ISP directly]. (*Id.* at p. 11.) Finally, although the findings do not so specify, it is undisputed that SBCIS and Raw Bandwidth are both ISPs, and that they are comparably situated, save for the fact that SBCIS is an affiliate of SBC, and Raw Bandwidth is not. Indeed, SBC, in its rehearing application, admitted that the reason it discriminates with respect to 611 calls is because it allegedly is allowed "to support SBCIS in ways that are not available to other, unaffiliated ISPs." (SBC Reh'g App. at 13.)

SBC complains that this analysis and these conclusions are insufficient, arguing that:

> "The Commission does not discuss the impact of such differential treatment on the end use subscribers of unaffiliated ISPs who have easy and direct access to the repair services through telephone numbers provided by their ISPs. The Commission does not discuss the cost to SBC CA of providing 611 IVR transfer service to the subscribers of all ISPs, whether affiliated or unaffiliated. The Commission does not discuss whether the unaffiliated ISPs would be willing to bear the cost of developing and maintaining such transfer service."

(SBC Reh'g App. at 17.) Section 453 does not, however, require the sort of quantification of costs and benefits that SBC describes, and SBC cites no authority to the contrary.

2. Federal Law Does Not Preclude Enforcement of Section 453.

SBC contends that, "By ignoring . . . federal law regarding the distinction between 'basic' transmission services and 'enhanced' services, and by prescribing the manner in which subscribers of high speed Internet access service are to be afforded access to repair services for that enhanced service, the Commission's decision purports to regulate the provision of high speed Internet service by SBCIS, regulation that is preempted by federal action. In this regard, the Commission has acted in excess of its jurisdiction." (SBC Reh'g App. at 15.) This argument has no merit.

SBC's argument is based on the distinction between what FCC classifies as "enhanced," rather than "basic" services. This distinction derives from the FCC's decision in its Final Decision, *Amendment of Section 64.702 of the Commission's Rules and Regulations* (*Computer II*) (1980) 77 F.C.C.2d 384, 418-28, ¶¶ 92-113 ("*Computer II*"). SBC correctly notes that federal law permits a carrier to give a variety of advantages to some ISPs with respect to the offering of enhanced services that the carrier does not give to others. In other words, carriers can, in fact, discriminate in certain ways, when it comes to the offering of enhanced services. SBC contends that the 611 calls at issue here are calls for repair of an enhanced service, and so, in SBC's view, federal law does not prohibit SBC from offering the 611 service to its own affiliated ISP without offering the same service to unaffiliated ISPs. (See SBC Reh'g App. at 6-8, 10-14.) SBC then concludes that because federal law allows it to discriminate with respect to enhanced services, and does not expressly prohibit discrimination with respect to 611 service, California may not enforce section 453 to prevent such discrimination here. (SBC Reh'g App. at 13-15.) SBC's argument lacks merit for several reasons.

First, there is a significant exception to the general rule that a carrier can discriminate with respect to the provision of enhanced services. A carrier may *not* do so by discriminating with respect to underlying basic network services that support those enhanced services. (See, e.g., *Computer II*, *supra*, at ¶ 231; *In re Appropriate Framework for Broadband Access to the Internet over Wireline Facilities* (2002) 17

F.C.C.R. 3019 ¶¶ 33-42.) So, for example, SBC cannot provide an advantage to its own ISP by giving that ISP better or faster DSL transport services than it gives to other, unaffiliated, ISPs. (See *id.*) SBC argues that this limitation does not apply here. SBC concedes, as it must, that DSL transport service – the high-speed pipeline that connects customers to their ISP – is a basic service under federal law. It contends, however, when customers purchase DSL service, they are not purchasing just naked DSL transport, but "internet access service," which includes not only the high-speed DSL pipeline, but all the other services that their ISP provides. This bundle of services, according to SBC, is an enhanced, not a basic service, and when customers call 611 for repair, they are calling for repair of the enhanced service, because they "have no way to know whether the problem with their Internet service is related to the customer premise equipment, the ISP's routers and servers, the internet backbone, the application on their computer, or the underlying DSL transport." (SBC Reh'g App. at 7.) Accordingly, SBC argues, its discriminatory treatment of unaffiliated ISPs with respect to 611 calls is not discrimination with respect to basic services, and so is permitted under the FCC's rules.

This conclusion is incorrect. SBC is correct that many of the services ISPs offer are "enhanced," not "basic." But, DSL transport – one of the bundle of services that ISPs offer – is indisputably "basic," as the Rehearing Decision notes. (See D.05-01-034, p. 9.) And the FCC has made clear that, for regulatory purposes, DSL transport does not lose its character as a basic service just because it is bundled for sale with other, enhanced services. (See, e.g., *In Re Deployment of Wireline Services Offering Advanced Telecommunications Capability* (1998) 13 F.C.C.R. 24,011 ¶¶ 36-37.) Accordingly, when a customer dials 611 to seek repair or information about problems with his or her DSL service, the customer is, at least in part, seeking to resolve an issue with the customer's basic service – DSL transport. The fact that the problem may in fact lie elsewhere is irrelevant because, as SBC concedes, at this point in the repair process no one knows where the problem lies. (See SBC Reh'g App. at 7.) Thus, when SBC provides more favorable treatment to customers of its own affiliates who dial 611 when such customers seek repair or information about problems which their DSL service, it is

failing to comply with the FCC's requirement that it provide non-discriminatory access to basic services. SBC's descriptions of the various ways in which it is permitted to provide advantages to its own affiliates with respect to the provision of enhanced services, (see SBC Reh'g App. at 11-14), are irrelevant.

Second, that the FCC's decision in *Computer III* (Report and Order, *Amendment of Section 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry)* (1986) 104 F.C.C.2d 958 ("*Computer III*")) allows SBC to use the same personnel and resources to support its provision of both basic and advances services does not dictate a different conclusion. (See SBC Reh'g App. at 11-14.) In *Computer III*, the FCC eliminated existing rules that prohibited such dual-use of resources and personal, concluding that carriers could use the same personnel and resources to support both basic and advanced services without creating an unacceptable risk that carriers would use that overlap to favor their own enhanced services offerings over those of competitors, by discriminating with respect to basic services necessary to provide those offerings. (See, e.g., *California v. FCC* (9th Cir. 1990) 905 F.2d 1217, 1225-30.) The FCC did so in light of its conclusion that certain other safeguards, such as its Comparably Efficient Interconnecion ("CEI") rules, would adequately mitigate the risks. (See *id.*) *Computer III*, however, merely concluded that carriers could use the same resources and personnel without creating an undue *risk* of illegal discrimination. The FCC never has held, as SBC argues, that carriers could use their resources and personnel actually to discriminate with respect to basic services.

Third, the fact that the FCC's CEI rules do not expressly prohibit discrimination with respect to 611 calls does not imply a federal intent to preempt state regulation in this area, as SBC suggests. (See SBC Reh'g App. at 14-15.) The CEI rules were intended to be "safeguards," to mitigate risks of discrimination. (See *California v. FCC, supra,* 905 F.2d at pp. 1225-30.) SBC cites no authority to support its contention that these rules constitute a "safe harbor provision," and that compliance with those rules protects carriers from any charges of discrimination. The mere fact that federal law does not explicitly prohibit specified conduct is not sufficient, contrary to SBC's contention

(see SBC Reh'g App. at 15, fn.34 and accompanying text), to show an intent to preempt state law. (See *Toy Mfgrs. of America v. Blumenthal* (9th Cir. 1993) 986 F.2d 615, 621-22 [demonstration of specific Congressional intent required].) And nothing in any FCC ruling, or in the Communications Act, even suggests any congressional intent to use the CEI rules, or any other rules, to supplant the bedrock statutory principle of non-discrimination with respect to basic network services, or to supplant existing state prohibitions on such conduct.

B. Non-material errors in the underlying decision

1. The Commission's Universal Service Rules

In the Rehearing Decision, the Commission concluded that SBC's discriminatory treatment of 611 callers violates the Commission's universal service requirements articulated in *In Re Universal Service and Compliance with the Mandates of AB 3643* [D.96-10-066], *supra*, 68 Cal.P.U.C.2d at pp. 666-667. Specifically, the Commission held that SBC's discrimination runs afoul of the Commission's rule that basic service under California law includes "free access to customer service for information about ULTS, service activation, service termination, *service repair* and bill inquiries." (See *id.*, at p. 667 [App. B., Rule 4.17].) This conclusion was, as SBC asserts, in error.

The Commission's designation of something as a "basic" service under California law has nothing to do with the FCC's designation of something as a "basic" service under *Computer II*. A basic service under California law is simply: "A certain defined minimum level of telecommunications service which each carrier of local exchange service is required to provide to all of its residential customers who request local exchange service.") (*Id*. at p. 665 [Rule 1.B].) Rule 4.B.17 mandates "free" access to . . . service repair . . . inquiries." "'Free' means there are no additional charges incurred by the customer when that service element is used by a customer.'" (*Id.* at p. 667.) Thus, the Commission's universal service rules require only that carriers provide access to repair service at no additional charge. If carriers satisfy that requirement – and

there is no dispute here that SBC fails to do so – nothing in the Commission's universal service rules prohibits carriers from providing levels of service above that minimum to some customers or not to others.

That said, the conclusion that SBC's discriminatory treatment of 611 calls violates the Commission's universal service rules was not essential to our determination to prohibit SBC from continuing such discrimination. The conclusion that SBC is violating section 453 is sufficient, standing alone, to justify the order. Thus, SBC's assignment of error on this issue does not require us to grant rehearing.

2. The FCC's N11 Order

SBC contends that the Challenged Decision errs in concluding that SBC's conduct violates the *FCC's N11 Order*, *supra*. In the Rehearing Decision we cited paragraphs 46 and 48 of the N11 Order, and concluded that our finding of discrimination was "consistent" with these paragraphs. (D.05-01-034, pp. 10-11.) To the extent that this discussion implied that SBC's conduct violates the *FCC's N11 Order*, that discussion was in error.

Paragraph 46 of the N11 Order requires equal access to N11 services by all "providers of telephone exchange service." Because Raw Bandwidth is an ISP, and not necessarily an exchange service provider, this provision of the N11 Order is not controlling here. Paragraph 48 of the N11 Order provides, in relevant part, "that a LEC may not itself offer enhanced services using a 411 code, or any other N11 code, unless that LEC offers access to the code on a reasonable, nondiscriminatory basis to competing enhanced service providers in the local service area." As noted above, at issue here is not the provision of an enhanced service, but a basic service. Accordingly, this provision of the *FCC's N11 Order* is not applicable either.[7]

[7] It is worth noting, however, that to the extent that SBC is correct in arguing that the 611 service at issue here is an enhanced service, then it would appear that SBC's conduct *would* be prohibited by the *FCC's N11 Order*.

Once more, however, because the Rehearing Decision is supportable without resort to the *FCC's N11 Order*, any error in relying on that Order was harmless, and does not require rehearing.

RAW BANDWIDTH'S ADVANCE NOTICE CLAIM AND RECONSIDERATION OF D.04-05-006 AND D.05-01-034

I. FACTS

Cause of Action 3, Count 6 of Raw Bandwidth's First Amended Complaint, described above, concerns the procedures that SBC follows when it disconnects a subscriber's DSL service due the subscriber's failure to pay for his underlying voice service (hereafter, "Raw Bandwidth's Advanced Notice Claim"). Briefly, Raw Bandwidth contended that when SBC disconnects a subscriber's voice service, SBC must give Raw Bandwidth 30 day's advance notice before SBC disconnects the subscriber's DSL service, to give Raw Bandwidth an opportunity to contact the subscriber to rectify the problem. (See generally D.04-05-006, pp. 6-7; D.05-01-034, p. 6.) Raw Bandwidth contended that SBC's failure to give it such advance notice was unreasonable under PU Code §§ 451 and 2896. (D.05-01-034, p. 6.)

On December 22, 2003, the Assigned ALJ dismissed, *inter alia*, Raw Bandwidth's Advance Notice Claim. (Administrative Law Judge's Ruling Granting SBC California, Inc. and SBC Advanced Solutions, Inc.'s Joint Motion to Dismiss Part of First Amended Complaint [Dec. 22, 2003]; C.03-05-023 ("Dec. 22, 2003 ALJ Ruling").) Raw Bandwidth requested reconsideration of that ALJ Ruling, and on May 6. 2004, the Commission denied Raw Bandwidth's request, and affirmed the ALJ's denial of the Raw Bandwidth's First Amended Complaint. (See D.04-05-006.) Raw Bandwidth applied for rehearing of that decision, which application was denied as to Raw Bandwidth's Advance Notice Claim in D.05-01-034 (the same decision that granted rehearing with respect to Raw Bandwidth's 611 claim, discussed above).

Thereafter, Raw Bandwidth filed a petition for a writ of review in the California Court of Appeal (Case No. A109210, First Appellate District, Division 4),

challenging the Commission's denial of its complaint with respect to the Advance Notice Claim. In that petition, Raw Bandwidth asserts, *inter alia*, that the Commission's denial of its Advance Notice Claim must be reversed because the Commission's decision (1) lacked adequate findings of fact and conclusions of law, as required by section 1705; and (2) made factual determinations that were improper under the standard that the Commission has adopted for addressing motions to dismiss. Raw Bandwidth asks the Court of Appeal to:

> "enter judgment . . . directing the Commission to reinstate Count 6 of the third Cause of Action . . . , or in the alternative to explain the dismissal of this count with adequate Findings of Fact and Conclusions of law . . . ."

(*Raw Bandwidth Communications, Inc. v. Public Utilities Comm'n of the State of Calif.*, No. A109210, Calif. Ct. App., First Dist., Div. 4, Raw Bandwidth Communication's Petition for Writ of Review of Decision by California Public Utilities Commission ("Writ Pet."), at p. 19.)

II. DISCUSSION

Upon review of Raw Bandwidth's writ petition in connection with its review of the underlying Commission decisions and analysis of Raw Bandwidth's application for rehearing of those decisions, discussed above, we have concluded that the issues raised in Raw Bandwidth's writ petition warrant further consideration.

We note, for example, that the basis for our denial of Raw Bandwidth's Advance Notice Claim is not entirely clear from the underlying decisions. By way of example only, the December 22, 2003 ALJ Ruling was based largely on the ALJ's interpretation of a prior settlement agreement between SBC and Raw Bandwidth. (Dec. 22, 2003 ALJ Ruling, slip op. at pp. 3-4.) D.04-05-006, however, was decided on other grounds, and expressly declined to discuss the merits of Raw Bandwidth's arguments regarding the settlement agreement. (D.04-05-006, p. 9.) But then, on rehearing, we again cited the settlement as one basis for the decision. (D.05-01-034, pp. 7-8.)

This lack of clarity regarding the basis for the Commission's decision also gives rise, in part, to Raw Bandwidth's contention in its writ petition that the Commission

failed properly to evaluate the facts before it. Raw Bandwidth alleges, for example, that some of the facts that formed the basis for the Commission's decision were not based on any evidence in the record. (See, e.g., Writ Pet., pp. 22-25.) Whether this contention has merit depends, in part, on the bases for our underlying decisions, which we will reconsider in further proceedings. Accordingly, we believe that it is appropriate to stay D.04-05-006 to the extent – and only to that extent – that they dismiss Raw Bandwidth's Advance Notice Claim; and to stay D.05-01-034 to the extent – and only to the extent – that it denies rehearing of D.04-05-006 with respect to Cause of Action 3, Count 6 of Raw Bandwidth's First Amended Complaint. We believe that it is appropriate to hold further proceedings for purpose of the reconsideration of Raw Bandwidth's Advance Notice Claim. The Assigned ALJ will issue a ruling setting a prehearing conference for the reconsideration.

CONCLUSION

Upon review of our holding in D.05-01-034, we find no material legal error warranting the granting of a rehearing. We do, however, find that D.05-01-034, and the underlying decision, D.04-05-006, should be modified to correct non-material errors and to clarify them so that there are consistent with the views expressed in this decision. Accordingly, we deny SBC's application for rehearing of D.05-01-034, as modified.

Upon review of our decision in D.04-05-006, we conclude that our determination to dismiss Count 6 of the Third Cause of Action of Raw Bandwidth's First Amended Complaint should be reconsidered. Accordingly, we stay D.04-05-006 and D.05-01-034 to the extent – and only to that extent – that they dismiss Raw Bandwidth's First Amended Complaint with respect to that count. The Assigned ALJ will set a prehearing conference to determine what further proceedings with respect to that count, consistent with this decision.

Therefore, **IT IS ORDERED** that:

1. D.05-01-034 is modified to make it consistent with today's decision:

a. The discussion in Section B beginning on page 8 and continuing through page 11 is deleted. This discussion is modified to read as follows:

> "At issue is whether the Defendants unlawfully discriminate by providing customers of their affiliated ISP, SBCIS, who dial 611 for DSL repair services the option of connecting to SBCIS without having to hang up, but informing unaffiliated ISPs' customers they must hang up and contact their ISP. Complainant asserts that SBC California's use of the 611 code to transfer calls to its own ISP, while refusing to do so for other ISPs, constitutes discrimination that is forbidden by PU Code §453. We agree that this differential treatment is unreasonably discriminatory in violation of §453, which is the relevant statute that needs to be addressed for our purposes.
>
> In enacting §453(a), the Legislature created a broad ban on discriminatory conduct. (*Gay Law Students Assn. v. Pacific Tel. & Tel. Co.* (1979) 24 Cal.3d 458, 478.) Section 453 prohibits public utilities from making or granting any preference or advantage or from establishing or maintaining any unreasonable difference "as to rates, changes, service, facilities or in any other respect." (Pub. Util. Code, § 453(a); see generally, *California Portland Cement Co. v. Southern Pacific Co*. [D.32280] (1939) 42 Cal.P.U.C.2d 92, 117.) The preference may be considered undue only if it provides an advantage to some customers and a disadvantage to others. (Id. at p. 117.) To establish any such effect, comparison must be made between comparable situations. (*Reuben H. Donnelley Corp. v. Pacific Bell* [D.91-01-016] (1991) 39 Cal.P.U.C.2d 209, 242.) The discussion and findings in the challenged decision, although brief, are sufficient to establish a violation of section 453 under these standards. Customers who dial 611 for repair services should not be treated differently based on whether or not they subscribe to the local exchange carrier's ISP. SBC California is an ILEC that connects more than 10,000 calls each month from its 611 interactive voice response system to its ISP, SBCIS. It does not offer such a connection to any other ISP. And there is no evidence in the record that SBCIS and Raw Bandwidth (or any other ISP) are not comparably situated in every material respect for the purposes of section 453. Accordingly, it is unduly discriminatory for SBC California to allow 611

connections directly to its ISP for repair of underlying DSL Transport, but deny Raw Bandwidth the same 611 access for repair of the same underlying DSL Transport.

The FCC's Computer III rules do not preclude a finding of discrimination. The Computer III proceedings drew the line between basic and enhanced services under federal law. DSL Transport is a basic common carrier transmission service, not an enhanced service. (*WorldCom v. FCC*, 246 F.3d 690, 694 (D.C. Cir. 2001) (DSL-based advanced services qualify as telecommunications services (i.e., common carrier services) to which certain Title II provisions apply) (vacated on other grounds); *In re Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 14 FCC Rcd 19, 237, 19, 247, ¶ 21 (1999) ("bulk DSL services sold to [ISPs]…are telecommunications services, and as such, incumbent LECs must continue to comply with their basic common carrier obligations with respect to these services"); *In Re Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 13 FCC Rcd 24, 011, 24, 030, ¶¶ 36-37 (1998) (Bell companies are under a continuing obligation under Computer II to offer competing ISPs non-discriminatory access to the telecommunications services utilized by Bell's information services). And the FCC has made clear that, for regulatory purposes, DSL transport does not lose its character as a basic service just because it is bundled for sale with other, enhanced services. (See, e.g., *In Re Deployment of Wireline Services Offering Advanced Telecommunications Capability* (1998) 13 F.C.C.R. 24,011 ¶¶ 36-37.)" Accordingly, when a customer dials 611 to seek repair or information about problems with his or her DSL service, the customer is, at least in part, seeking to resolve an issue with the customer's basic service – DSL transport. The fact that the problem may in fact lie elsewhere is irrelevant unless and until the source of the problem has, in fact, been identified. Thus, when SBC provides more favorable treatment to customers of its own affiliates who dial 611 when such customers seek repair or information about problems which their DSL service, it is failing to comply with the FCC's requirement that it provide non-discriminatory access to basic services."

b. Ordering Paragraph Nos. 3-16 on pages 14-17 of D.05-01-034 are deleted. To the extent that the modifications made in D.05-01-034 to D.04-05-006 are inconsistent with the modifications of D.04-05-006 made in today's decision, the latter modifications are controlling.

2. D.04-05-006 is modified to make it consistent with today's decision, and with D.05-01-034, as modified. (A copy of D.04-05-006, as modified, is attached as Attachment A to this order.) D.04-05-006 is modified as follows:

a. The words "do not" are deleted from Line 2 of the first full paragraph of Section I. Summary on page 1.

b. The words "or otherwise" are deleted from Line 4 of the first full paragraph, and replaced by "and" on page 1.

c. The last two sentences in Section I. Summary on page 3 is replaced by the following language:

> "Raw Bandwidth, an unaffiliated ISP, sees no reason why SBC California cannot automatically connect Raw Bandwidth's subscribers to its service department when they call 611 with a DSL question or difficulty. We hold that the subscribers of unaffiliated ISPs should not be burdened with the additional step of hanging up and calling their service department, while subscribers of SBC California and its affiliates are not so burdened when they call service repair."

d. The second full paragraph beginning on page 6 and continuing to page 7 is deleted.

e. The last paragraph of Section IV. Discrimination Issue on page 10 is deleted, and replaced with the following new paragraph:

> "We note that a significant number of subscribers call 611 for repair services, and a significant number are connected to SBCIS. We therefore hold that this differential treatment is unlawful because the fact that Raw Bandwidth's DSL service subscriber must hang up

and call Raw Bandwidth's service department disadvantages unaffiliated ISPs."

f. Section IV.A. SBC California's Differential Treatment of Customers Making 611 Calls Does Not Violate FCC Requirements on pages 10-13 is deleted and replaced by the following:

"**A. Section 453**

Section 453 prohibits public utilities from making or granting any preference or advantage or from establishing or maintaining any unreasonable difference "as to rates, changes, service, facilities or in any other respect." (Pub. Util. Code, § 453(a); see generally, *California Portland Cement Co. v. Southern Pacific Co*. [D.32280] (1939) 42 Cal.P.U.C.2d 92, 117.) The preference may be considered undue only if it provides an advantage to some customers and a disadvantage to others. (Id. at p. 117.) To establish any such effect, comparison must be made between comparable situations. (*Reuben H. Donnelley Corp. v. Pacific Bell* [D.91-01-016] (1991) 39 Cal.P.U.C.2d 209, 242.) Here:

- SBC California transfers over 10,000 calls per month from its 611 IVR to its affiliated ISP, SBCIS.

- SBC California does not transfer calls from its 611 IVR to unaffiliated ISPs.

- If an SBCIS subscriber with a DSL repair problem dials 611 from an SBC California telephone line, the caller receives an IVR prompt that will permit the customer to be connected to SBCIS without having to hang up and dial a new number. A non-SBCIS subscriber with a DSL problem who dials 611 from an SBC California telephone line receives an IVR prompt to hang up and call the subscriber's ISP.

These findings clearly establish the fact of discrimination, which, indeed, is undisputed. They also establish the fact that discrimination operates to confer an advantage to some customers and a disadvantage to others. Finally, it is undisputed that SBCIS and Raw Bandwidth are both ISPs, and that they are comparably situated, save for the fact that SBCIS is an affiliate of SBC, and Raw Bandwidth is not.

Federal law does not dictate a different conclusion. The parties stipulated that the FCC's Computer III rules govern SBC California's obligations regarding enhanced services, and agree that the rules require SBC California provide unaffiliated ISPs nondiscriminatory access to the same services and functions underlying the provision of enhanced services to its affiliated ISP. SBC's focus on enhanced services, however, is not the proper focus here. DSL Transport is a basic common carrier transmission service, not an enhanced service. (*WorldCom v. FCC*, 246 F.3d 690, 694 (D.C. Cir. 2001) (DSL-based advanced services qualify as telecommunications services (i.e., common carrier services) to which certain Title II provisions apply) (vacated on other grounds); *In re Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 14 FCC Rcd 19, 237, 19, 247, ¶ 21 (1999) ("bulk DSL services sold to [ISPs]…are telecommunications services, and as such, incumbent LECs must continue to comply with their basic common carrier obligations with respect to these services"); *In Re Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 13 FCC Rcd 24, 011, 24, 030, ¶¶ 36-37 (1998) (Bell companies are under a continuing obligation under Computer II to offer competing ISPs non-discriminatory access to the telecommunications services utilized by Bell's information services). And the FCC has made clear that, for regulatory purposes, DSL transport does not lose its character as a basic service just because it is bundled for sale with other, enhanced services. (See, e.g., *In Re Deployment of Wireline Services Offering Advanced Telecommunications Capability* (1998) 13 F.C.C.R. 24,011 ¶¶ 36-37.) Accordingly, when a customer

dials 611 to seek repair or information about problems with his or her DSL service, the customer is, at least in part, seeking to resolve an issue with the customer's basic service – DSL transport. The fact that the problem may in fact lie elsewhere is irrelevant unless and until the source of the problem has, in fact, been identified. Thus, when SBC provides more favorable treatment to customers of its own affiliates who dial 611 when such customers seek repair or information about problems which their DSL service, it is failing to comply with the FCC's requirement that it provide non-discriminatory access to basic services. In this circumstance, nothing in federal law undermines our conclusion that SBC's discrimination violates section 453.

That the FCC's decision in *Computer III* allows SBC to use the same personnel and resources to support its provision of both basic and advances services does not dictate a different conclusion. In *Computer III*, the FCC eliminated existing rules that prohibited such dual-use of resources and personal, concluding that carriers could use the same personnel and resources to support both basic and advanced services without creating an unacceptable risk that carriers would use that overlap to favor their own enhanced services offerings over those of competitors, by discriminating with respect to basic services necessary provide those offerings. (See, e.g., *California v. FCC* (9th Cir. 1990) 905 F.2d 1217, 1225-30.) The FCC did so in light of its conclusion that certain other safeguards, such as its Comparably Efficient Interconnecion ("CEI") rules, would adequately mitigate the risks. (See *id.*) *Computer III*, however, merely concluded that carriers could use the same resources and personnel without creating an undue *risk* of illegal discrimination. The FCC never has held that carriers could use their resources and personnel actually to discriminate with respect to basic services.

Similarly, the fact that the FCC's CEI rules do not expressly prohibit discrimination with respect to 611 calls does not imply a federal intent to preempt state regulation in this area, as SBC suggests. (See SBC Reh'g App. at 14-15.) The CEI rules were intended to be "safeguards," to mitigate risks of discrimination. (See *Calif. v. FCC, supra*, 905 F.2d

at pp. 1225-30.) There is no authority that these rules constitute a "safe harbor provision," and that compliance with those rules protects carriers from any charges of discrimination. The mere fact that federal law does not explicitly prohibit specified conduct is not sufficient to show an intent to preempt state law. (See *Toy Mfgrs. of America v. Blumenthal* (9th Cir. 1993) 986 F.2d 615, 621-22 [demonstration of specific Congressional intent required].) And nothing in any FCC ruling, or in the Communications Act, even suggests any congressional intent to use the CEI rules, or any other rules, to supplant the bedrock statutory principle of non-discrimination with respect to basic network services, or to supplant existing state prohibitions on such conduct."

g. Section IV.B. The Transfer of 611 Calls Does Not Raise Competitive Concerns on pages 13-14 is deleted and replaced by the following:

"**B. Competition**

Concerning the issue of competition, we need only consider whether by requiring customers of unaffiliated ISPs to hang up and call their ISP, those customers are placed at a competitive disadvantage by being burdened by such a requirement when callers of affiliated ISPs are not. From a competition viewpoint, it is enough that customers of unaffiliated ISPs must take that extra step. Moreover, our focus is not with SBCIS, but rather with the local exchange carrier over whom we have plenary authority as granted by the Legislature and the California Constitution, art. XII. We conclude that SBC California, by its practices, confers an undue competitive advantage to its affiliates if customers can use abbreviated dialing (611) for repair of SBC's DSL service, but must use regular dialing to reach the unaffiliated DSL provider."

h. The third sentence in the third paragraph of Section V. Comments on Draft Decision on pages 14-15 is deleted.

i. The fourth paragraph of Section V. Comments on Draft Decision on page 14 is deleted.

j. The word "further" is deleted from Line 1 of the fifth Paragraph of Section V. Comments on Draft Decision on page 15.

k. Finding of Fact Nos. 8-11 are renumbered Finding of Fact Nos. 9-12.

l. The following Finding of Fact is added as Number 8:

"There is no evidence that SBC's affiliated ISP and Raw Bandwidth are not similarly situated in all material respects for the purposes of Pub. Util. Code § 453."

m. The language in Conclusion of Law No. 2 on page 19 is deleted and replaced with the following:

> "Pub. Util. Code §453 prohibits SBC California's practice of requiring on 611 calls for digital subscriber line repair service, the subscribers of unaffiliated ISPs to hang up and call their service department while subscribers of its affiliates are not required to take that extra step."

n. Conclusion of Law Nos. 3, 4, 6, and 7 are deleted.

o. Conclusion of Law No. 5 is renumbered as Conclusion of Law 3.

p. The following is added as a new conclusion of law, and numbered as Conclusion of Law No. 4:

> "SBC California, by its practices, confers an unlawful competitive advantage on its affiliates if its customers can use abbreviated dialing (611) for repair of SBC's DSL service, but others must use regular dialing to reach the unaffiliated DSL provider."

q. Conclusion of Law Nos. 8 is renumbered as Conclusion of Law No. 5, and the word "hearing" is replaced by the word "herein."

r. Conclusion of Law No. 9 is renumbered as Conclusion of Law No. 6.

s. The language in Ordering Paragraph No. 1 on page 20 is deleted and replaced with the following:

> "Except as provided below with respect to Raw Bandwidth's claim regarding discrimination in the provision of 611 service, all other claims in Raw Bandwidth's complaint are dismissed."

t. The following is added as a new ordering paragraph, and numbered as Ordering Paragraph No. 2:

> "SBC shall not require the subscribers of unaffiliated ISPs to hang up and call their own ISP's service department while subscribers of SBC's affiliates are not required to take that extra step on 611 calls for digital subscriber line ("DSL") repair service. If SBC provides 611 service to facilitate service calls for DSL repair for customers of its affiliated ISP(s) -- connecting them directly to the appropriate service department -- it must provide the same service for customers of non-affiliated ISPs."

u. Ordering Paragraph Nos. 2-3 are renumbered Ordering Paragraph Nos. 3-4.

3. Rehearing of D.05-01-034, as modified, is hereby denied.

4. D.04-05-006 and D.05-01-034 are stayed to the extent – and only to that extent – that they dismiss Count 6, Cause of Action 3, of Raw Bandwidth's First Amended Complaint, and the Commission will reconsider its determinations of that issue.

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5. The Assigned ALJ shall set a prehearing conference to discuss further consideration and proceedings with respect to that count, consistent with this decision.

This Order is effective today.

Dated May 26, 2005, at San Francisco, California.

MICHAEL R. PEEVEY
President
GEOFFREY F. BROWN
DIAN M. GRUENEICH
SUSAN P. KENNEDY
JOHN A. BOHN
Commissioners

Attachment A to D0405006